

CHAPTER TEN

DRIVING UNDER THE INFLUENCE (2003)

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INSTRUCTION NO. [10-101]

[Ways of this State Open to the Public, 2003]

The phrase "ways of this state open to the public" means any highway, road, alley, lane, parking area, or other public or private place adapted and fitted for public travel that is in common use by the public.

GIVEN: _____
District Judge

Source: MCJI 10-101

Plaintiff's Proposed Instruct. No. ____ Defendant's Proposed Instruct. No. ____

Given as Instruction No. ____ Refused ____ Withdrawn ____ By ____

[Ways of the State Open to the Public, (2003), Source and Comments]

SOURCE: MCA § 61-8-101 (2003).

COMMENT: Cite as MCJI 10-101.

INSTRUCTION NO. [10-401]

[Driving Under the Influence of Alcohol, 2003]

A person commits the offense of driving under the influence of alcohol if, while under the influence of alcohol, he/she drives or is in actual physical control of a vehicle upon the ways of this state open to the public.

GIVEN: _____
District Judge

Source: MCJI 10-401

Plaintiff's Proposed Instruct. No. ____ Defendant's Proposed Instruct. No. ____

Given as Instruction No. ____ Refused ____ Withdrawn ____ By ____

[Driving Under the Influence of Alcohol (2003), Source and Comments]

SOURCE: MCA § 61-8-401(1)(a) (2003).

COMMENT: Cite as MCJI 10-401.

This instruction should be used only in those cases in which alcohol is involved since only subsection (1)(a) utilizes the phrase "ways of this state open to the public." Subsections (b), (c) and (d) require that the vehicle be operated "within this state." Consequently, if the Defendant is charged under these subsections, the instruction must be modified accordingly.

INSTRUCTION NO. [10-401(a)]

[Issues In Driving While Under the Influence of Alcohol, 2003]

To convict the Defendant of the offense of driving while under the influence of alcohol, the State must prove the following elements:

That the Defendant:

1. was [driving] [in actual physical control of] a vehicle
2. upon the ways of this state open to the public
3. while under the influence of alcohol.

If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

GIVEN: _____
District Judge

Source: MCJI 10-401(a)

Plaintiff's Proposed Instruct. No. ____ Defendant's Proposed Instruct. No. ____

Given as Instruction No. ____ Refused ____ Withdrawn ____ By ____

[Issues in Driving Under the Influence of Alcohol (2003), Source and Comments]

SOURCE: MCA § 61-8-401(1)(a) (2003).

COMMENT: Cite as MCJI 10-401(a).

This instruction is designed to be utilized in a case in which alcohol is the substance involved. If the Defendant is charged under subsection (1)(b), (c) or (d), the language in element number 2 relative to where the vehicle was operated will have to be modified accordingly.

Although conviction under this statute subjects Defendant to possible jail time, subsection 7 of 61-8-401 provides for absolute liability thus negating the need for proving particular mental state. *See, State v. McDole*, 226 Mont. 169, 734 P.2d 683 (1987).

INSTRUCTION NO. [10-401(3)]

[Under the Influence, 2003]

The phrase "under the influence" means that as a result of taking into the body [alcohol] [drugs] [or any combination thereof], a person's ability to safely operate a motor vehicle has been diminished.

GIVEN: _____
District Judge

Source: MCJI 10-401(3)

Plaintiff's Proposed Instruct. No. ____ Defendant's Proposed Instruct. No. ____

Given as Instruction No. ____ Refused ____ Withdrawn ____ By ____

[Under the Influence, 2003, Source and Comments]

SOURCE: MCA § 61-8-401(3) (2003).

COMMENT: Cite as MCJI 10-401(3).

The above statutory definition utilizes the term "motor vehicle" while the offense provisions of the statute refer to "vehicle." The definition of these terms in 61-1-103 suggests that "vehicle" may have a broader application.

INSTRUCTION NO. [10-401(4)]

[Inferences--Driving Under the Influence, 2003]

The concentration of alcohol in the Defendant, as shown by analysis of a sample of his/her blood or breath, drawn or taken within a reasonable time after the alleged act of driving under the influence of alcohol, gives rise to the following inferences:

(a) If there was at that time an alcohol concentration of 0.04 or less, it may be inferred that the Defendant was not under the influence of alcohol.

(b) If there was at that time an alcohol concentration in excess of 0.04 but less than 0.08 that fact may not give rise to any inference that the Defendant was or was not under the influence of alcohol, but the fact may be considered with other competent evidence in determining the guilt or innocence of the Defendant.

(c) If there was at that time an alcohol concentration of 0.08 or more, you are permitted, but not required, to infer that the Defendant was under the influence of alcohol.

You must weigh the evidence presented and decide whether the State has proven beyond a reasonable doubt that the Defendant was under the influence of alcohol.

GIVEN: _____
District Judge

Source: MCJI 10-401(4)

Plaintiff's Proposed Instruct. No. _____ Defendant's Proposed Instruct. No. _____

Given as Instruction No. _____ Refused _____ Withdrawn _____ By _____

[Inferences –Driving Under the Influence, 2003 Source and Comments]

SOURCE: MCA § 61-8-401 (2003); MCA § 61-8-407 (2003).

COMMENT: Cite as MCJI 10-401(4).

INSTRUCTION NO. [10-401(5)]

[Inferences—Refusal of Breath or Blood Test, 2003]

You are instructed that if a person under arrest for the offense of Operating a Motor Vehicle While Under the Influence of Alcohol and/or Drugs refuses to submit to a test which detects the presence of alcohol, drugs or a combination of alcohol and drugs, proof of that refusal is admissible in a trial of that offense. The jury may infer from the refusal that the person was under the influence. That inference is rebuttable.

GIVEN: _____
District Judge

Source: MCJI 10-401(5)

Plaintiff's Proposed Instruct. No. ____ Defendant's Proposed Instruct. No. ____

Given as Instruction No. ____ Refused ____ Withdrawn ____ By ____

[Inferences – Refusal of Breath or Blood Test, 2003, Source and Comments]

SOURCE: MCA § 61-8-404(2), 2003

COMMENT: Cite as MCJI 10-401(5).

INSTRUCTION NO. [10-406]

[Alcohol Concentration, 2003]

A person commits the offense of operating a vehicle with an alcohol concentration of 0.08 or more if he drives or is in actual physical control of a vehicle upon the ways of this state open to the public while the alcohol concentration in his/her blood, breath, or urine is 0.08 or more.

GIVEN: _____
District Judge

Source: MCJI 10-406

Plaintiff's Proposed Instruct. No. ____ Defendant's Proposed Instruct. No. ____

Given as Instruction No. ____ Refused ____ Withdrawn ____ By ____

[Alcohol Concentration, 2003, Source and Comments]

SOURCE: MCA § 61-8-406 (2003).

COMMENT: Cite as MCJI 10-406.

MCA § 61-8-407 defines the standard for determining alcohol concentration.

INSTRUCTION NO. [10-406(a)]

[Issues In Alcohol Concentration, 2003]

To convict the Defendant of the offense of operating a motor vehicle with an alcohol concentration of 0.08 or more, the state must prove the following elements:

That the Defendant:

1. was [driving] [in actual physical control of] a vehicle
2. upon the ways of this state open to the public
3. while the alcohol concentration in his/her blood, breath or urine was 0.08 or more.

If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt, then you should find the Defendant guilty.

If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt then you should find the Defendant not guilty.

GIVEN: _____
District Judge

Source: MCJI 10-406(a)

Plaintiff's Proposed Instruct. No. ____ Defendant's Proposed Instruct. No. ____

Given as Instruction No. ____ Refused ____ Withdrawn ____ By ____

[Issues in Alcohol Concentration, 2003, Source and Comments]

SOURCE: MCA § 61-8-406 (2003).

COMMENT: Cite as MCJI 10-406(a).

The statute defining this offense provides that it is an absolute liability offense thereby negating the necessity of proving a particular mental state, even though jail time is a possibility upon conviction.

INSTRUCTION NO. [10-201]

[Actual Physical Control, 2003]

The Defendant is in actual physical control of a motor vehicle if the Defendant is not a passenger and is in a position to, and has the ability to, operate the vehicle in question. [A motorist does not relinquish control over a vehicle simply because it is incapable of (starting) (moving).]

GIVEN: _____
District Judge

Source: MCJI 10-201

Plaintiff's Proposed Instruct. No. ____ Defendant's Proposed Instruct. No. ____

Given as Instruction No. ____ Refused ____ Withdrawn ____ By ____

[Actual Physical Control, 2003, Source and Comments]

SOURCE: *State v. Robison* 931 P.2d 706 (Mont. 1997); *Turner v. State*, 705 P.2d 982 (Mont. 1990); *Gebhardt v. State*, 775 P.2d 1261 (Mont. 1989).

COMMENT: Cite as MCJI 10-201.

The final, bracketed, sentence of this instruction is for use in those situations where, for example, a vehicle has become stuck (*Gebhardt v. State*, 775 P.2d 1261 (Mont. 1989)) or the vehicle will not start but is being manually directed (*Turner v. State*, 705 P.2d 982 (Mont. 1990)). In those circumstances use the final sentence with the appropriate language.